

ARREST OF VESSELS IN THE PORTUGUESE JURISDICTION – FLAG ISSUES

Portugal is a party of the International Convention Relating to the Arrest of Seagoing Ships, Brussels of 10 May 1952 (the BC Arrest Convention 1952).

The BC Arrest Convention 1952 has on its article 2 the following (closed) list of claims illegible for arrest:

- (a) damage caused by any ship either in collision or otherwise;
- (b) loss of life or personal injury caused by any ship or occurring in connexion with the operation of any ship;
- (c) salvage;
- (d) agreement relating to the use or hire of any ship whether by charterparty or otherwise;
- (e) agreement relating to the carriage of goods in any ship whether by charterparty or otherwise;
- (f) loss of or damage to goods including baggage carried in any ship;
- (g) general average;
- (h) bottomry;
- (i) towage;
- (j) pilotage;
- (k) goods or materials wherever supplied to a ship for her operation or maintenance;
- (l) construction, repair or equipment of any ship or dock charges and dues;
- (m) wages of Masters, Officers, or crew;
- (n) Master's disbursements, including disbursements made by shippers, charterers or agent on behalf of a ship or her owner;
- (o) disputes as to the title to or ownership of any ship;
- (p) disputes between co-owners of any ship as to the ownership, possession, employment, or earnings of that ship;
- (q) the mortgage or hypothecation of any ship.

Under Portuguese Law, in general, an arrest will be awarded if the claimant is able to prove, in a *prima facie* manner, two essential conditions:

- i. (about the claim) – that the claim/credit basing the arrest is probable, in the sense of viable, in a future final judgment on the merits, the so-called *fumus bonus juris* and;
- ii. (about the debtor) – that the creditor has a justified fear of loosing the guarantee of its payment which our law understands as the estate of the debtor. In other words, this condition will be met if the claimant convinces the court that the debtor is dissipating assets or that it is likely to engage in such dissipation. This situation is defined by the classical Latin Law expression *periculum in mora*.

The condition mentioned as ii) – the *periculum in mora* – is the major difficulty a creditor has to face when trying to arrest an asset in Portugal because the concept is fluid by nature and the circumstances have to be analysed on a case by case basis. It is often difficult to make such evidence and to lodge a victorious arrest application.

It is in this critical point that that the BC Arrest Convention 1952 comes into play by allowing the claimant to obtain a vessel arrest without incurring in the, sometimes diabolic, probation of the *periculum in mora* whenever a claim listed in article 2 is at stake.

The matter, however, requires a cautious analysis of the implications of the flag which the vessel intended for arrest flies.

Article 8 of the BC Arrest Convention 1952 uses the criteria of the flag to determine the scope of application of the convention. If the vessel to be arrested flies the flag of a state member of the convention, the convention is applicable as per its article 8/1.

But, if such vessel flies the flag of a non-member state, article 8/2 establishes that the vessel “may be arrested in the jurisdiction of any Contracting State in respect of any of the maritime claims enumerated in article 1 or of any other claim for which the law of the Contracting State permits arrest.”

So, the convention establishes that vessels which fly non-member state flags may be arrested based on two types of claims:

- i) On the ones listed in article 2 of the convention (see above) but also
- ii) On any other claims which, in accordance with domestic laws, permits the arrest.

Portugal has not made use of the faculty mentioned in article 8/3 of the CB 1952.

So, by virtue of article 8/2 of the convention (untouched in Portugal for the lack of any reservation under article 8/3) in which non-member states’ vessels is concerned, the list contained in article 2 actually works as an “extension” of the cases where the arrest is permitted under the convention.

In this respect Portuguese case law has been clear in establishing that such is the right interpretation of the said article 8/2 of the CB 1952. A decision by the Maritime Court of Lisbon (case 247/15.TNLSB of 11.05.2015) confirmed such understanding and held that the regime established by the Convention is entirely applicable to an arrest of a vessel which flies the flag of a non-member state (...) which means that such vessel may be arrested both for the claims listed in article 1 of the CB 1952 and for all other which are admitted by the *lex fori* (...).

For vessels flying the flags of member states, however, the effect of the convention is restrictive in the sense that those vessels may only be arrested under the convention for claims which are listed in the list of article 2. Thus, for these vessels, article 1 possesses really the nature of a “closed list” and a double effect is produced: On one hand, member states’ vessels will suffer the effects of such list by being exposed to an effective arrest mechanism which does not require the evidence of the *periculum in mora*, but, on the other hand, they will be protected by the immunity effect the convention grants them by excluding the possibility of any arrest based in other claims – article 2.

The above explained difference of treatment between member states’ vessels and non-member states’ vessels is particularly crucial when one realizes that the list of article 1 of the CB 1952 convention fails to contemplate some important claims in the shipping industry such as insurance premiums and navigation agents’ fees expenses, just to give two examples.

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